

THE OCCUPATIONAL SAFETY AND HEALTH ACT: A LABOR LAWYER'S OVERVIEW

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I. INTRODUCTION

The expansive role which federal law plays in private sector industrial relations is now and has long since been a fundamental fact of life to the practicing labor lawyer. Suffice it to say, Wagner, Taft-Hartley and Landrum-Griffin merely furnish convenient, short-hand reminders of the daily influence which federal law exerts on such diverse subject areas as employer-union-employee relations, internal union activities, and the negotiation, interpretation and enforcement of collective bargaining agreements. I would like to focus my attention upon a new dimension in this regulatory scheme, one that perhaps in the long run will prove to be the most profoundly far-reaching of all federal labor statutes—the Occupational Safety and Health Act of 1970¹ (hereinafter referred to as "OSHA").

The search for an appropriate point of departure for this discussion provides a formidable challenge itself. For those attorneys who have had the opportunity to become involved in any of the multitude of intriguing legal problems relating to the initial interpretation, application, or implementation of OSHA, there is an almost irresistible tendency to focus directly on those specific experiences. However, I have opted to resist this temptation here since it inevitably increases the likelihood of failing to perceive the forest through the trees, and the OSHA "forest" is indeed imposing.

What OSHA does, in essence, is to place an estimated four million establishments engaged in interstate commerce, employing 57 million persons, within the jurisdictional reach of the federal government, acting through the Secretary of Labor. The Act confers broad authority upon the Secretary to promulgate and enforce occupational safety and health standards applicable to all such establishments and, further, to require employers to furnish places of employment free from "recognized hazards that are causing or likely to cause death or serious physical harm to his employees."

The declared Congressional purpose vividly illustrates the breadth of the objective sought to be achieved. It goes beyond the bounds of pure industrial relations, entering into the arena of progressive social reform "to assure so far as possible every working man and woman in the nation

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¹ 29 U.S.C. §§ 651-78 (1970).

safe and healthful working conditions and to preserve our human resources,"² which is to be accomplished, *inter alia*, "by providing medical criteria which will assure insofar as practicable that no employee will suffer *diminished* health, functional capacity or *life expectancy* as a result of his work experience."³

Underlying OSHA is the Congressional recognition that to attain this ambitious goal the authority of the federal government must reach out into the hitherto untouchable work situs itself. This fundamental policy decision constitutes a radical departure from the pre-existing status quo: for characterized most charitably, federal government involvement with respect to safe and healthy working conditions had been spotty and ineffectual.⁴

This void had not been filled by any satisfactory alternative prior to OSHA. State workmen's compensation laws at best provide woefully inadequate benefit schedules out of touch with present day realities.⁵ More important, those laws are predicated on the concept of providing *after the fact*, out-of-pocket compensation for losses to employees injured in industrial accidents. As such, they fail to come to grips with the worker's acute needs—affirmative, effective safety programs designed to *prevent* accidents and exposure to health hazards.

Second, the process of collective bargaining only produced a variety of interim stopgap measures. Generally speaking, union efforts at the bargaining table to impose more stringent controls over safety and health have been beaten back as cost conscious companies continue to guard zealously their "managerial prerogatives" over these subject areas against erosion from any source. In any event, even assuming that unions had made more significant gains, the impact would have been confined to the organized sector, which reflects only a modest percentage of the nation's overall workforce.

The stage was thus set for much needed reform. As is so often the case, the spark which triggered legislative action here was the amalgam of several compelling, albeit diverse developments: (1) statistics on industrial accidents and health hazards demonstrated that the country was on a disaster course of human self-destruction (accident rates had deteriorated to the point that 14,000 workers died and 2.2 million were dis-

² 29 U.S.C. § 651(b) (2) (1970).

³ 29 U.S.C. § 651(b)(7) (1970) (emphasis supplied).

⁴ See generally BUREAU OF NATIONAL AFFAIRS, THE JOB SAFETY AND HEALTH ACT OF 1970 at 14-15 (BNA 1970). During the course of the debates, Senator Javits (Rep. N. Y.), one of the leading proponents of the bill, commented that there had been "over 30 years of utterly dismal performance by the Department of Labor of its safety and health responsibilities under the Walsh-Healy Act . . ." SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF OSHA 194 (Comm. Print 1971) (hereinafter cited as "LEGISLATIVE HISTORY").

⁵ See, e.g., THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMAN'S COMPENSATION LAWS (1972).

abled each year by accidents in the work place); and (2) as Congress became increasingly conscious of environmental problems resulting from air and water pollution,⁶ a parallel concern about working in a polluted environment surfaced. The Surgeon General estimated in a 1967 study of 1,700 industrial plants that 65 percent of the workers were potentially exposed to harmful physical agents, but only 25 percent were adequately protected. The study estimated that about 400,000 new cases of occupational disease would occur each succeeding year. Further,

known hazards went unchecked. Lead and mercury poisoning affected substantial numbers of workers. Asbestosis, clinically defined over 40 years ago, remained a threat. Allied diseases increased in number. The danger of byssinosis for workers in cotton mills, recognized in the United States in the fifties, grew unabated.⁷

This is not to say that unanimity pervaded the halls of Congress. As has been true with respect to all major pieces of federal labor legislation, the statute as finally enacted reflected numerous substantive compromises.⁸ The compromises were hammered out in the aftermath of the clash of divergent views strongly held by the opposing forces of labor and management. The end result of this dynamic political process is self-evident; the most cursory perusal of the Act by a trained legal mind will uncover a seemingly endless parade of loopholes and ambiguities. Although some will be discussed herein, no purpose would be served in chronicling the entire interpretive morass which is our legacy. In passing, I merely note that the following statement from a recent speech on OSHA delivered by the minority counsel, Senate Labor and Public Welfare Committee, is pertinent:

As a participant in the drafting process at every stage, I can assure you that this law is one of the most carefully drafted pieces of legislation ever to be enacted by Congress. Every word in the law was carefully and deliberately chosen. Incidentally, that doesn't mean there aren't ambiguities in the law; there are, but most of them are deliberate, rather than the re-

⁶ See, e.g., Clean Air Act, 42 U.S.C. § 1857, as amended, 42 U.S.C.A. § 1857 (1971); Water Quality Improvement Act of 1970, 33 U.S.C. § 1151 (1970).

⁷ THE JOB SAFETY AND HEALTH ACT OF 1970, *supra* note 4, at 13-14. The true magnitude of the industrial environmental pollution problem was eloquently described in the Report of the House Committee on Labor and Education accompanying H.R. 16785:

More and more nationwide activities are focusing on the "Environmental Crisis" — the pollution of air and water and the destruction of natural resources The issue of the health and safety of the American working man and woman is the most crucial one in the whole environmental question because it is out of the work place that the problem of pollution arises; and over 80 million workers spend over one-third of their day in that environment

H.R. REP. NO. 91-1291, 91st Cong., 2d Sess. 14-15 (1970); see also S. REP. NO. 91-1282, 91st Cong., 2d Sess. 2-3 (1970).

⁸ See, e.g., *Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 99-100 (1958).

sult of oversight. In Congress, as elsewhere, vagueness is sometimes preferable to clarity.⁹

One cannot help being impressed by this refreshing ring of candor. Yet, the message implicit in this statement does not augur well—for the more ambiguities built into a statute, the greater the likelihood of extended litigation. I daresay such a development may not be greeted with overwhelming disapproval by the bar; however, parochial interests aside, in the area of industrial safety and health which concerns us here, delay and recalcitrance are uniquely undesirable; they fly directly in the face of the overriding social objectives of the Act.

II. THE ESSENCE OF THE ACT

A. *Structure and Procedure*

We turn now to the basic structure of the Act. My comments are intended only as a "bare bones" treatment. The main thrust of the statute, as noted, is to require employers to comply with occupational health and safety standards promulgated by the Labor Secretary and to enforce compliance through the issuance of citations for violations of the standards, imposition of monetary penalties, and prescription of time schedules for the correction of any such violations (the so-called abatement period). A supplemental "general" duty is also imposed on employers to furnish a place of employment free from "recognized hazards."

In view of the preeminent role occupied by "standards," it should be noted preliminarily that the statute sets forth in painstaking detail a comprehensive, time-consuming *modus operandi* designed to insure that no standard will be promulgated until the Secretary has had the opportunity to request the assistance and recommendations of an expert, ostensibly non-partisan advisory committee,¹⁰ and until all interested persons have had an opportunity to: (1) receive written notice, through the Federal Register, of the proposed rule; (2) submit written statements of position and supporting data; and (3) object to a *proposed* standard, and request and receive a public hearing on such objections.¹¹ Simply put, procedural "due process" is guaranteed in the course of promulgating standards.

Further, any person adversely affected by a standard may petition for judicial review in an appropriate United States court of appeals within the 60 day limitation provided in § 6(f).¹² The filing of such petition

⁹ Address by Eugene Mittleman, Industrial Relations Association of Greater St. Louis Labor-Management Conference, March 8, 1972.

¹⁰ The composition and functions of such advisory committee are discussed in detail in §§ 7(b), 6(b)(1), 29 U.S.C. §§ 656(b), 655(b)(1) (1970).

¹¹ *Id.* § 655.

¹² *Id.* § 655(f). On September 6, 1972, the Industrial Union Department, AFL-CIO, and

shall not operate as a stay, unless otherwise ordered by the court.¹³ On review, the test for sustaining the Secretary's determination is that enunciated in *Universal Camera Corp. v. NLRB*¹⁴—"substantial evidence in the record considered as a whole."

Consistent with the realities of the industrial world, the statute contemplates that the number of standards which will ultimately be promulgated will reflect the multitude of existing safety and health hazards and, further, that periodic modifications, amendments or revocations will become necessary because of the ever changing environmental condition of the work place. Likewise, Congress recognized that the Secretary of Labor, and indeed his entire department, lacked the medical and technical expertise to conduct research and experimental projects necessary to identify toxic substances and harmful physical agents—for example, cancer producing materials—and to develop criteria for use in formulating appropriate occupational safety and health standards in these vital areas. To fill this void, Congress specifically created the National Institute for Occupational Safety and Health (hereinafter "NIOSH") in the Department of Health, Education and Welfare.¹⁵ The purpose was to insure that these critically important functions would be performed by impartial experts affiliated with the public service who were not dependent upon private industry for their incomes or research grants.¹⁶ The tremendous breadth of the charter accorded to NIOSH by OSHA is reflected in the language of § 20(a) (3):

[O]n the basis of said research demonstrations, and experiments, and any other information available . . . [NIOSH] shall develop criteria dealing with toxic materials and harmful physical agents and substances which will describe exposure levels that are safe for various places of employment, including but not limited to the *exposure levels at which no employee will suffer impaired health or functional capacities or life expectancy as a result of his work experience*.¹⁷

numerous affiliated international unions filed a petition for review of the standard for asbestos dust recently promulgated by Secretary of Labor Hodgson, Civil No. 72-1713, D. C. Cir. (Sept. 6, 1972). This is the first court test challenging the validity of an occupational safety and health standard and, accordingly, we will have to await the judicial gloss placed on OSHA by the court of appeals.

¹³ *Id.*

¹⁴ 340 U.S. 474 (1950).

¹⁵ The Secretary of HEW is authorized to appoint the Institute's Director for a term of six years and to remove said Director at his discretion pursuant to § 671(b).

¹⁶ 29 U.S.C. §§ 671(a), 669(a) (3) (1970).

¹⁷ 29 U.S.C. § 669(a) (3) (1970) (emphasis supplied). The creation of NIOSH was the product of Senator Javits' amendment to S. 2193. In explaining the purpose of his amendment, Javits stated:

The establishment of this institute will elevate the status of occupational health and safety research to place it on an equal footing with the research conducted by HEW into other matters of vital social concern

Equally important, the research and recommendations of the institute will be of initial importance in continually improving occupational health and safety standards promulgated under this act [I]t is apparent that the government must develop

The relationship which Congress established between the responsibility of NIOSH for developing a criteria document and that imposed on the Secretary for ultimately promulgating a standard is particularly noteworthy. Section 6(b)(5) directs the Secretary, in promulgating standards dealing with toxic materials or harmful physical agents, to

set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

Read together, these sections reflect a clear legislative purpose and objective: to have NIOSH initially develop a criteria document based upon its research, demonstrations, experiments and other currently available technical information and, thereafter, to have the Secretary promulgate a standard based upon those criteria. Significantly, the requirement which the Secretary must satisfy in promulgating a standard under § 6(b)(5) of OSHA closely parallels the stated standard for the criteria which NIOSH is directed to develop, as provided by § 20(a)(3).

More specifically, each is assigned a portion of the task of insuring that the standard set will guarantee that no employee suffers diminished health, functional capacity or life expectancy, even if he has regular exposure to the hazards throughout an entire working life. The only meaningful difference between their respective mandates is that the Secretary has been accorded an additional degree of limited discretion. In promulgating a standard, he must set the most adequate one that is "feasible."¹⁸

a capacity for developing these standards which will operate independently of self interest groups.

LEGISLATIVE HISTORY, *supra* note 4, at 195 (emphasis supplied). Senator Williams (N.J.) also explained that "the Institute was created in order to give the maximum priority and visibility to the all-important task of research into these occupational health and safety problems . . . [I]t will be a pioneering development if it becomes enacted . . ." *Id.* at 434.

¹⁸ The "feasibility" consideration was inserted into the Act by an amendment offered by Senator Javits to S. 2193, the bill which ultimately became the Senate version of OSHA. In Senate Report No. 91-1282, accompanying S. 2193, the Committee on Labor and Public Welfare stated:

On . . . numerous . . . issues involved in this legislation the Committee was able to reach virtually complete agreement. Many of the more difficult problems were resolved, and the bill thereby strengthened, through the adoption of amendments offered by members of the minority. Among the more important of these amendments are the following:

Javits Amendments

. . . .

4. Feasibility of standards. As a result of this amendment the Secretary, in setting standards, is expressly required to consider feasibility of proposed standards. This is an improvement over the Daniels bill which might be interpreted to *require absolute health and safety in all cases*, regardless of feasibility, and the Administration bill which contains no criteria for standards at all."

Id. at 196 (emphasis supplied). Senator Dominick (R-Colorado) initially voiced his concern with the proposed language of § 6(b)(5) that required the Secretary to establish standards which most adequately and feasibly assured to the extent possible that no employee would suffer

In structuring the Act, Congress recognized two further practical realities. First, promulgation of the thousands of standards required by OSHA would be a time-consuming, complex process which could result in fatal time lags for employees already subject to grave danger from exposure to toxic substances or physically harmful agents. Second, technical problems of implementation might arise. For example, because of the unavailability of a particular machine or piece of equipment, an employer or perhaps even several employers might be unable to comply with a newly created standard when it became effective.

Congress addressed itself to the former problem in § 6(c)(1). It states that the Secretary

shall provide . . . for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.¹⁹

any impairment of health or functional capacity of life expectancy even if regularly exposed to the hazard. He contended that this language "could be read to require the Secretary to ban all occupations in which there remains some risk of injury, impaired health, or life expectancy . . . [T]he present criteria could, if literally applied, close every business in this nation." Primarily because of this concern, Senator Dominick offered Amendment No. 1054 to S. 2193 which would have deleted the above stated requirement from § 6(b)(5). *Id.* at 365-67. Thereafter, however, Senator Dominick modified his amendment to include exactly the same language which ultimately was enacted into law as § 6(b)(5). In explaining his change of position, Senator Dominick engaged in the following colloquy with Senator Williams:

Mr. Dominick: What we are trying to do in the bill . . . was to say that when we are dealing with toxic agents or physical agents, we ought to take such steps as are feasible and practical to provide an atmosphere within which a person's health or safety would not be affected.

. . .

Mr. Williams: As I understand this amendment, it will provide a continued direction to the Secretary that he shall be required to set the standard which most adequately and to the greatest extent feasible assures, on the basis of the best available evidence, that no employee has continual exposure to the hazard dealt with for the period of his working life. Certainly that is the objective, and included within this concept of unimpaired health and functional capacity is protection against diminished life expectancy.

. . .

Mr. Dominick: It is my understanding, if I may say so, that what we are doing now is to say that the Secretary has got to use his best efforts to promulgate the best available standards, and in so doing, that he should take into account that anyone working in toxic agents or physical agents which might be harmful may be subjected to such conditions for the rest of his working life, so that he can get at something which might not be toxic now, if he works in it a short time, but if he works in it the rest of his life it might be very dangerous; and we want to make sure that such things are taken into consideration in establishing standards; is that correct?

Id. at 402-03.

¹⁹ The emergency standard shall remain in effect until superseded by the promulgation of a permanent standard, which must occur no later than six months after publication of the emergency temporary standard under § 6(c)(2). In the interim period, the Secretary is required to conduct a full scale proceeding for setting a standard; the temporary emergency standard serves as the Secretary's proposed rule in that proceeding (§ 6(c)(3)).

To deal with technical difficulties in compliance, Congress created a mechanism whereby any employer may apply to the Secretary for a temporary order granting a variance from a standard under § 6(b)(6)(A). But in providing a basis for obtaining a variance, Congress took painstaking care to insure that it was not thereby opening the door to abuses of the fundamental objectives of the Act. To foreclose any such possibility, the circumstances which justify granting a variance are strictly limited. Section 6(b)(6)(A) provides that the employer must establish, *inter alia*, that: (1) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date; (2) during the interim, he is taking all available steps to safeguard his employees covered by the standard; and (3) he has an effective program for coming into compliance with the standard as quickly as practicable.²⁰

The actual mechanism for insuring compliance with the "standards" is the inspection which is conducted under the auspices of the Secretary of Labor by specially trained and experienced federal personnel. If, after an inspection has been conducted, the Secretary or his authorized representative believes that an employer has violated any standard or any of the requirements of the general duty provision, then he is obliged to issue a written citation, "with reasonable promptness,"²¹ to such employer describing the particular nature of the violation(s) committed.²² The employer

²⁰ "The economic implications of a standard for an employer are not to be considered in the determination as to whether a variance is to be allowed." LEGISLATIVE HISTORY, *supra* note 4, at 1201.

²¹ Section 9(c) also provides for a six month statute of limitations; no citation may be issued more than six months after the occurrence of the violation. This raises an interesting question if the violation is "continuing" in nature (*e.g.*, daily emissions into the atmosphere cause a dust count in excess of the prescribed standard). In those circumstances, it would seem that, at the very least, a citation is permissible if it refers to the condition in the plant during the six months immediately preceding the citation date.

²² 29 U.S.C. § 658(a) (1970). The Act also contemplates that there may be situations in which, upon investigating, an inspector concludes that dangerous conditions or practices exist at a place of employment which "could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the [normal] enforcement procedures otherwise provided by [OSHA]." 29 U.S.C. § 662(a) (1970). To cope with this situation, the statute authorizes the Secretary of Labor to seek injunctive relief to restrain any such imminent danger—even if this means closing down an employer's entire plant operation or a portion thereof until the danger has been abated. *Id.* Federal district courts are expressly empowered to assert jurisdiction over such cases and to grant appropriate injunctive relief under § 12(b).

In assessing the foregoing provisions it should be emphasized that the inspector who observes the "imminent danger" situation firsthand is *not* empowered to seek injunctive relief; he can only recommend to the Secretary who, in turn, must make the final decision whether to pursue this course of action. However, the statute does contain two safeguards of significance to the affected employees and their union representatives. First, in circumstances in which the inspector concludes that an imminent danger exists, he is required to "inform the affected employees and the employer of the danger and that he is recommending to the Secretary that relief be sought"

must promptly post the citation at or near each place a violation referred to in the citation occurred.²³ In addition, the citation must fix a reasonable time limit for the abatement of the violation.²⁴ Promptly thereafter, or in conjunction with the issuance of the citation, the Secretary is also empowered to notify the employer of the penalty, if any, proposed to be assessed for such violation.²⁵ In turn, the statute contains a detailed set of rules²⁶—perhaps best described as a schedule of maximum monetary penalties for each violation—which the Secretary can propose²⁷ and which the Commission (a three member body completely independent of the Secretary) ultimately can assess in contested cases.²⁸

The Secretary's citation of violation and proposed penalty shall be

(§ 13(c))). Second, if the Secretary nonetheless refuses or fails to exercise his authority to seek injunctive relief, "any employee who may be injured by reason of such failure" or his representative may initiate a mandamus action against the Secretary in an appropriate district court to compel him to seek injunctive relief under § 13(d). The plaintiff in any such action can prevail only upon showing that the Secretary acted "arbitrarily or capriciously." *Id.*

However, even under this stringent standard a writ of mandamus should issue unless the Secretary comes forward with some compelling, objective reasons for failing to heed the recommendation of his technically qualified inspector who personally viewed the employer's premises and found an imminent danger present.

To insure that employees are in the best possible posture for invoking a mandamus action, labor unions should notify all local safety committees to request inspectors to issue employers imminent danger citations *before* departing their premises. This will obviate any possible dispute as to whether the inspector did or did not *orally* state that such a situation exists in circumstances in which the Secretary ultimately determines not to seek injunctive relief.

To date, the imminent danger injunction has been used on just two occasions—*after* a tunnel cave-in resulted in the loss of 22 workers' lives in Port Huron, Michigan, 2 O.S.H. RBP. 72, at 5004 (BNA 1972), and to restrain construction by Northeastern Contracting Co. (at its Hartford, Conn. job site) of a trench that OSHA alleged was improperly shored, 2 O.S.H. RBP. 72, at 388 (BNA 1972). Whether this reflects lack of aggressive enforcement on the part of the Secretary or the fact that employers are promptly abating *all* imminent danger situations called to their attention by inspectors is a subject about which one can only speculate at this time. Hopefully, the Secretary will report in detail his actual experiences under the imminent danger provision of OSHA in the near future. Absent such documentation, we are hardpressed to understand why this statutory provision has not been utilized much more frequently.

²³ *Id.* § 659(b). 29 C.F.R. § 1903.16 (1972) gives a detailed breakdown of the ground rules adopted by the Secretary concerning the location and quantity of notices required to be posted.

²⁴ *Id.*

²⁵ *Id.* § 659(a).

²⁶ *Id.* § 666.

²⁷ Note that the variations in the penalty schedules reflect such distinctions as "serious" versus "non-serious" violations in § 17(k); willful or repeated versus occasional and unintentional violations in § 17(a); and cases in which willful violation causes death to an employee in § 17(e).

²⁸ *Id.* § 666(j), which provides:

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

For an insight into the manner in which the Commission has interpreted and applied this penalty provision, *see, e.g.*, Secretary of Labor v. Nacirema Operating Co., 2 O.S.H. RBP. 77, at 1001 (BNA 1972) ("the four criteria to be considered in assessing penalties cannot always be given equal weight"); Secretary of Labor v. Hidden Valley Corp. of Va., 2 O.S.H. RBP. 72, at 1004 (BNA 1972).

deemed a final and unreviewable order, *unless* within 15 working days upon receipt of the notice an employer advises the Secretary (and the employee representative) that he wishes to contest either of his determinations.²⁹ No contest was filed in 95 percent of the more than 30,000 enforcement actions initiated through August, 1972.³⁰ The filing of a timely notice of contest will automatically set in motion an extensive quasi-judicial proceeding in which the Secretary carries the burden of proof.³¹ In such a case, the independent Commission assigns one of its hearing examiners³² to conduct an evidentiary hearing which culminates, much like a federal district court proceeding, in findings of fact, conclusions of law and an order affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief.³³ Any person adversely affected by an order may petition³⁴ to invoke the Commission's discretionary review authority.³⁵ Not surprisingly, to date the Commission (hereinafter "OSHRC") has exercised its discretionary power to review in only six percent of the decisions filed by its judges.³⁶ Even if an adversely affected party does not prevail before the OSHRC (either because its petition for review is denied or the Commission reaches the merits and sustains the examiner's order) then judicial review before an appropri-

²⁹ We assume here that neither the employee nor the employee representative has opted to exercise his right to contest the reasonableness of the abatement period fixed by the Secretary in the citation, as provided in § 20(c); if the latter occurs, this triggers a review proceeding before the Commission, including an evidentiary hearing before an examiner. Read literally, § 20(c) limits the right of an employee or a union to file a notice of contest to those situations in which it is alleged that "the period of time fixed in the citation for the abatement of the violation is unreasonable." In *Oil, Chemical and Atomic Workers v. Mobil Oil Corp.*, Dock. No. 562, OSH Rev. Comm. (filed March 1, 1972), the Commission is presently considering the union's contention that under § 20(c) its jurisdiction also extends to cases where the union's challenge is not directed at the reasonableness of the abatement period set forth on the face of the citation, but rather at the fact that the violation was *not* abated within that period.

³⁰ Address by Chairman Robert D. Moran, American Bar Association Labor Law Section Meeting, August 15, 1972.

³¹ See 29 C.F.R. § 2200.73(a) (1972) (OSHRC Rules of Procedure; see also 29 C.F.R. §§ 2200.1-110 (revised Rules of Procedure effective Sept. 28, 1972).

³² Now fully clothed with the title of "judge" by Commission fiat under 5 U.S.C. § 5105(c) (1970).

³³ 29 U.S.C. §§ 659(c), 661(j) (1970). The similarity between an OSHR proceeding and standard practice in federal district court at the pre-trial discovery stage is likewise apparent. See, e.g., 29 C.F.R. §§ 2200.51, .52, .55 (1972). Cf. however, § 2200.53, precluding depositions of parties and witnesses except by special order of the Commission or a judge serving as hearing examiner.

³⁴ 29 C.F.R. § 2200.91 (1972).

³⁵ Under the rules as originally promulgated, the Commission adopted stringent standards for granting review closely analogous to the standards applied by the NLRB in requests for review of Regional Director's determinations in representation cases. For example, petitioner had to establish that a substantial question of either law or policy was involved under § 2200.42. However, the new rules recently promulgated are silent as to the basis upon which "discretionary review" will be granted in § 2200.91. Note also that any one Commissioner can direct that a judge's decision be reviewed according to OSHA § 12(j).

³⁶ Moran, note 30 *supra*.

ate court of appeals is available as of right³⁷ upon the timely filing of a petition within 60 days from issuance of the order.³⁸

B. *Comparison with NLRA*

Based on the foregoing outline, certain general observations can be made by the labor practitioner familiar with the manner in which the NLRB functions. Thus, like the General Counsel under the NLRA, the Secretary serves as the investigator of complaints and the prosecutor insofar as such investigations demonstrate violations of OSHA. So too, in contested cases the party respondent is entitled to an evidentiary hearing before an independent tribunal ("judges" assigned to OSHRC). Unlike the NLRA, however, aggrieved parties are not entitled to Commission review as of *right* and, further, insofar as judicial review is concerned, the aggrieved party must file a *timely* petition for review or else the OSHRC order will automatically become final and binding.³⁹ In large measure, it would seem evident that OSHA's emphasis on "finality" and strict time limits for invoking judicial review reflect the Congressional decision to accommodate "due process" considerations with the pressing reality that time is of the essence in protecting employees against exposure to unsafe or unhealthy working conditions.

There exist some even more fundamental differences. First, while the NLRA prohibits certain specific, defined *practices* of employers and labor organizations, OSHA does not. As noted, it merely places in the Secretary's hands the responsibility and open-ended authority to promulgate such safety and health "standards"⁴⁰ as are deemed necessary and to cite employers for violations. Second, the roles of the two statutes are reversed insofar as remedies are concerned. The NLRA does not presume to establish an all inclusive list of available remedies.⁴¹ Congress chose, instead, to provide the Board with a broad grant of discretionary authority to take such affirmative action as would effectuate the policies of the Act, to be exercised in light of the facts of each particular case.

³⁷ 29 U.S.C. § 660(a) (1970).

³⁸ *Cf. id.* §§ 660(a), (b). A broader choice of forums is available to the "persons aggrieved" by an OSHRC order (they can file in the D. C. Circuit as a matter of right) than is available to the Secretary if he is the petitioning party.

³⁹ *Id.* §§ 660(a), (b). Under the NLRA, by contrast, Board orders are never self-enforcing. Thus, even if a respondent company chooses not to petition for review, the Board is obligated to seek enforcement of its order in an appropriate circuit court. Absent such a decree, the continued refusal to comply with a Board order does not subject a respondent to citations for civil or criminal contempt.

⁴⁰ Of course, as noted above, insofar as toxic substances and harmful physical agents are concerned, the Secretary is mandated to set the standards which meet the requirements of § 6(b)(5).

⁴¹ *See, e.g.,* NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953) ("Section 10(c) of the Taft-Hartley Act . . . charges the Board with the task of devising remedies to effectuate the policies of the Act. . . . [T]he power . . . is a broad discretionary one. . . .").

OSHA, on the other hand, contains a very comprehensive and highly structured set of rules governing assessment of civil and/or criminal penalties.

OSHA and the NLRA proceed down divergent paths in still other respects. Whereas the latter, of course, proscribes certain unfair labor practices attributable both to employers and labor organizations,⁴² *only* employers are subject to the strictures of OSHA: labor organizations are not, except to the limited extent that they too serve as "employers." This reflects the reality that safety is a managerial function and responsibility, as has long been recognized both in the basic policy underlying workmen's compensation legislation and the collective bargaining relationship.⁴³ Employees are admonished to comply with safety and health standards,⁴⁴ but are not subject to being named as party defendants. Undoubtedly, in making this conscious decision, Congress was aware that employers would not be left without recourse. The normal disciplinary procedures can be invoked insofar as any employee refuses to comply with any reasonable directive relating to safety matters generally or standards in particular.

Further, union lawyers may wish to savor, and their management counterparts contemplate warily, the fact that, under OSHA, Congress conferred upon labor unions⁴⁵ a much more expansive opportunity to participate actively in all stages of compliance and enforcement than is the case with respect to "charging parties" under the NLRA. While statistics per se are often misleading, just by virtue of the number of times that OSHA expressly confers upon labor organizations participatory rights while functioning as the employees representative, it appears that Congress has created a situation unparalleled in any other labor legislation.⁴⁶

This brief description highlights the obvious fact that OSHA is destined to generate a substantial challenge to the labor bar. For purposes of this paper, we shall confine ourselves primarily to the legal problems attendant to compliance. This seems appropriate for several reasons: the

⁴² 29 U.S.C. §§ 657(a), (b).

⁴³ [C]ollective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its functions

Steelworkers v. Warrior and Gulf Navigation, 363 U.S. 574, 583 (1960). So too, safety and health, along with the above mentioned specific subject matters, are functions of management. *See, e.g., Bethlehem Steel Co., XI STEEL ARBITRATION AWARDS* 8171 (1963); *STEELWORKERS HANDBOOK ON ARBITRATION* at 939-41 (Pike & Fisher 1970); *cf. Bryant v. United Mine Workers*, 81 L.R.R.M. 2401 (6th Cir., Sept. 26, 1972).

⁴⁴ 29 U.S.C. § 654(b) (1970).

⁴⁵ OSHA talks in terms of the "representative of employees," which in a sense has broader (and perhaps even more genteel) connotations than does "labor union." For purposes of this paper, however, I shall resort to the more familiar term "labor union" and assume, further, that where used it refers to either a representative "certified" pursuant to an NLRB order, or a representative lawfully recognized by an employer as exclusive agent for an appropriate unit of employees.

⁴⁶ *See, e.g.,* 29 U.S.C. §§ 355(b) (1), 356(a) (1), 357(c) (3), (e), (f) (1), 359(a), (c) (1970).

inspection lies at the heart of the Act, and, further, it is at this stage in the proceeding that we can expect substantial demands for legal advice from labor and management clients alike.

One preliminary caution: in embarking upon this new experience, it is not enough just to have the literal language of the Act at your disposal. Life under OSHA is not destined to be that simple. The Secretary has issued extensive regulations elaborating upon the manner in which he plans to carry out his responsibilities under many sections of the statute⁴⁷ and, as if to compound the intellectual challenge, a third has been added in the form of an imposing Operations Manual containing even more detailed information on this same topic. Irrespective of whether one would agree that the contents of the latter two documents are in all respects consistent with the statutory language,⁴⁸ they are on the "required reading list" in order to understand fully how the Secretary is administering the Act.

C. *Translating the Act Into A Living Reality*

1. Self-policing

Insofar as the all important problem of enforcing occupational health and safety standards is concerned, Congress essentially made two judgments. It recognized the need for a formal mechanism whereby an employee (or his bargaining agent) who believed that a violation of a standard existed which threatened physical harm could so notify the Secretary and thereby invoke the compliance processes of the Act, commencing with a special inspection. But Congress was equally cognizant that, from a pragmatic standpoint, this formal, time-consuming, quasi-adjudicatory process could not by itself offer a workable solution. As noted, an estimated four million establishments and facilities with 57 million employees are currently covered by the Act. In contrast, the 1973 federal budget provides funds for only about 600 inspectors and, more importantly, less than 100 industrial hygienists who alone have the technical expertise to test for toxic substances and harmful physical agents. There is thus no way for the available manpower to effectively enforce the existing 400 standards for toxic substances, let alone to conduct all the regular and special inspections under §§ 8(a) and (c)(1) of the Act.⁴⁹ Obviously, this means that many

⁴⁷ *Id.* § 657(g) (2).

⁴⁸ Indeed, a cynic's delight for wiling away the late evening hours is to follow this course: first read the Operations Manual; next cross reference the regulations and, upon satisfying yourself that the Manual is true to the words of the regulation, *then* analyze whether the Manual nonetheless fails to satisfy the language of the Act itself.

⁴⁹ Precisely because of this manpower shortage, the Secretary has established a priority system pursuant to § 6(g) for conducting inspections under which the following order is applicable: first, catastrophe and/or fatality inspections; second, complaints alleging violations; third, inspections of certain specified target industries; and fourth, general inspections and related activities.

The target industries program was developed in pursuance of OSHA's goal to deal with the

work places will not be scheduled for a regular government inspection for years, if ever, in the normal course of events.⁵⁰

All the foregoing prompted Congress to make extensive provision for self-policing by employers as a meaningful supplement to the formal enforcement process. It did so on the basis of a reasonable assumption that employees and their union representatives would serve as the Secretary's "eyes, ears, nose and throat" for purposes of observing daily whether their employers were complying with the Act. The self-policing principle occupies a prominent place in the OSHA scheme. Thus, § 8(c)(1) provides that the Secretary shall issue regulations requiring employers, through the posting of notices or other appropriate means, to keep their employees informed of the protections accorded by OSHA, including the applicable occupational safety and health standards.

It would appear that the Secretary has not fully complied with this mandate. Instead of requiring that employers obtain and post copies of applicable standards, as the statute dictates, the Secretary by regulation has substantially diluted this obligation by providing, in 29 C.F.R. § 1903.02(c)(1) (1972), that only "if an employer has obtained copies of [applicable standards] he shall make them available upon request to any employee or his authorized representative . . ." From a practical standpoint this could well make a crucial difference. For if, as explained, employees are to serve in a "watch dog" capacity in enforcing safety and health standards, they must have ready access to their contents. Nor should the right to such vital information hinge upon the mere happenstance of whether the employer decides to obtain copies for his use.⁵¹

Each employer is also obligated to "make, keep and preserve, and make available to the Secretary of Labor or the Secretary of HEW, such records regarding his activities relating to the Act as the Secretary . . . may prescribe by regulation as necessary or appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational accidents and illnesses."⁵²

With respect to work-related deaths, injuries or accidents (other than of a minor nature), OSHA places broad authority in the hands of the Secretary to impose, by regulation, the requirement that employers maintain accurate records and make periodic reports to the Secretary under § 8(c)(2).

"worst-first" within the resources available. In 1972 efforts were concentrated on the five industries with the highest reported injury-frequency rates: namely, longshore; lumber and wood products; roofing and sheet metal; meat and meat products; and mobile homes and other transportation equipment. Operating Manual, 2 O.S.H. REP. 77, at 2302-03 (BNA 1970).

⁵⁰ See, e.g., JOB SAFETY AND HEALTH ACT OF 1970, *supra* n. 4, at 44.

⁵¹ Of course, the possibility exists that the Secretary might be vulnerable to a mandamus action to challenge his refusal to require employers to obtain and post applicable standards. But this alternative suffers from an obvious shortcoming—it places an unnecessary burden on employees and their agents to invoke costly, time-consuming litigation.

⁵² 29 U.S.C. § 657(c)(1) (1970).

This same basic theme is carried forward and, indeed, expanded insofar as exposure to toxic substances and harmful physical agents is concerned. Congress was keenly attuned to the need to place meaningful requirements on employers, supplemented by the right of employees (and their union) to know what dangers they were being subjected to in their work places. Thus, once an employer is required to monitor or measure employee exposure to a toxic substance (for example, asbestos dust), the Secretary is obligated to promulgate regulations which provide the "employees or their representative with an opportunity to observe such monitoring or measuring and to have access to the records thereof."⁵³ Even more far reaching is the provision imposing on employers the affirmative duty to notify all employees exposed to toxic substances or harmful physical agents at levels which exceed those proscribed by the standard and, further, to advise them "of the corrective action being taken."⁵⁴ In a nutshell, § 8(c)(3) precludes employers from keeping employees in the dark about the true dimensions of their pollution plight. The ingenuity of this legislative approach is readily evident: it is designed to minimize resort to formal procedures by placing heavy stress on prompt resolution of environmental pollution problems through normal industrial relations channels after employees and unions have notice concerning the real facts.

2. Enforcement

Assume that an employee or labor union "believes" that there exists a violation of the general duty clause or a safety and health standard which threatens physical harm, or an "imminent danger" is present. Either party may request an inspection of the workplace by notifying the OSHA Area Director in writing.⁵⁵ Precisely because Congress did not want blue collar workers to be held accountable to any technical "pleading" rules, it required only that parties set forth with "reasonable particularity the grounds for the notice."⁵⁶ The notice must be signed by the employee or his union; to assure that employers are placed on notice of the alleged violation, a copy must be provided to the employer no later than at the time of inspection. An individual employee or group of employees may believe that it is in their best interest to remain anonymous so as to avoid the wrath or perhaps even the disciplinary arm of an unenlightened em-

⁵³ 29 U.S.C. § 657(c)(3) (1970).

⁵⁴ *Id.*

⁵⁵ If an employee places a telephone call to a Regional Office, he will be requested to reduce the oral notice of violation to writing; to further assist the employee in satisfying governmental "red tape," the Region is under instruction to forward the necessary "forms" to such person. Operations Manual, 2 O.S.H. REP. 77, at 2702 (BNA 1970).

⁵⁶ 29 U.S.C. § 357(f)(1) (1970); see also 29 C.F.R. § 1903.11(a) (1972).

ployer.⁵⁷ If so, they may request that the copy furnished the employer *not* contain their names and the Secretary is obliged to honor that request.⁵⁸

Upon receipt of the notice in the Regional Office, if the Area Director determines that an inspection is warranted he shall direct a "special inspection" to be conducted "as soon as practicable." In making this determination, the familiar test of "reasonable ground to believe" controls. Since this is a very liberal test, it may be anticipated that, in the vast majority of cases, if any employee has written an intelligible complaint which on its face refers to an alleged existing safety or health hazard, a special inspection will result. On those occasions in which a determination is made not to go forward, even to the extent of conducting an inspection, the Area Director is required to notify the employee and his union in writing accordingly.⁵⁹ Union lawyers may well be consulted at this stage and it is important to note that they have an avenue of appeal remaining; the complaining party may obtain review of that determination by submitting a timely written statement of position to the Regional Administrator. Further, the Regional Administrator, at his discretion, may also act favorably on a request for an informal conference in which all interested parties, including the employer, participate. Under the Secretary's regulations the Regional Administrator's decision "shall be final and not subject to further review."⁶⁰

By analogy to the settled case law under the NLRA holding that the decision of the General Counsel against issuing an unfair labor practice complaint is unreviewable,⁶¹ it would appear that any litigant would face a similar uphill struggle in trying to persuade a federal district court to review the Regional Administrator's refusal to inspect. At best, the only conceivable basis for seeking to invoke the court's jurisdiction would be if the employer's alleged violation was serious in nature, posing a threat to human life or limb, and the Administrator's refusal was provably egregious and unjustifiable. In those limited and unusual circumstances, many courts would be reluctant to hide behind the protective umbrella of "no jurisdiction," especially where an informal session in chambers might persuade the Secretary to conduct an inspection after all.

Assuming that an inspection is to take place, a variety of legal considerations emerges. Quite naturally, the first concern of the employer's counsel is what advance notice his client is entitled to, if any. The statute deals with this practical question in an interesting, albeit indirect, fashion. The

⁵⁷ *But see id.* § 660(c)(1) (precluding acts of recrimination against employees who exercise their rights under OSHA): *see also* National Labor Relations Act, 29 U.S.C. § 159(a) (64) (1970).

⁵⁸ 29 U.S.C. § 657(f)(1) (1970).

⁵⁹ *Id.*; *see also* 29 C.F.R. § 1903.12 (1972).

⁶⁰ 29 C.F.R. § 1903.12 (1972).

⁶¹ *Vaca v. Sipes*, 386 U.S. 171 (1961).

compliance and enforcement provisions, where one would expect to find guidance, are silent as to advance notice. But § 17(f), relating to penalties, provides that "any person who gives advance notice of any inspection to be conducted . . . without authority from the Secretary, or his designee, shall, upon conviction, be punished by a fine of not more than \$1,000 or by imprisonment for not more than six months, or both."⁶²

From this, the Secretary has divined that Congress intended that in promulgating rules regarding advance notice, two competing considerations should each be accorded some weight. On the one hand, a general prohibition would help to insure that employers would not have the opportunity to make last minute desperation adjustments of a minor or temporary nature, creating the misleading impression that no problem exists when the realities are to the contrary. The countervailing consideration is that the purpose of the Act is to cure defects before injuries occur and, in certain circumstances, advance notice might be consistent with that objective—for example, in cases of apparent imminent danger should the object be to encourage the employer to abate as quickly as possible.

The outcome of the balancing process invoked by the Secretary manifests itself in § 1903.6 of the regulations, supplemented by the Operations Manual.⁶³ In essence, the Secretary has established a general policy of not authorizing "broad" use of advance notice, subject to conferring upon the Area Director or the Compliance Safety and Health Officer (that is, the inspector or "CSHO") discretion to do so in certain defined circumstances⁶⁴ and/or whenever "the Area Director determines that giving of advance notice would enhance the probability of an effective and thorough inspection."⁶⁵ The evident difficulty with the foregoing is that it is all things to all people. The open-ended nature of the above quoted "exception" literally invites extended resort to advance notice; it is very hard to square with the more general policy against such advance notice. This confusion is compounded when we analyze the specific circumstances which the Secretary has deemed to constitute valid bases for granting advance notice. Thus, common sense—let alone the realities of industrial life—would seem to dictate that some authorized representative of the employer should be present on the premises at all times that the plant is operating.

⁶² 29 U.S.C. § 666(f) (1970).

⁶³ Operations Manual, 2 O.S.H. REP. 77, at 2501-13 (BNA (1970)).

⁶⁴ Advance notice of inspections may not be given, except in the following situations:

(1) In cases of apparent imminent danger, to enable the employer to abate the danger as quickly as possible; (2) in circumstances in which the inspection can most effectively be conducted after regular business hours or special preparations are necessary for an inspection, or (3) if necessary to assure the presence of representatives of the employer and employees or the appropriate personnel needed to aid in the inspection.

29 C.F.R. § 1903.6 (1972).

⁶⁵ *Id.*

Yet, incongruous though it may be, the Secretary has authorized resort to advance notice, *inter alia*, "where necessary to assure the presence of representatives of the employer."⁶⁶ In any event, this much is clear: if advance notice is given, it is the employer's responsibility to promptly notify the union as well,⁶⁷ and such advance notice shall not exceed 24 hours except in cases of apparent imminent danger and "other unusual situations"—which presumably means situations not usual—whatever that means!⁶⁸

3. The Walk Around

Section 8(e) of the Act provides, in relevant part, that

a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . for the purpose of aiding such inspection.

While to the outside observer this simple, declarative statement hardly seems noteworthy, the fact is that § 8(e) gave rise to an emotion packed donnybrook which ultimately culminated in a victory for labor. Irrespective of whether an employer opts to participate in the active inspection, he cannot interfere with the employee representative's right to do so.

At stake from management's standpoint was its cherished property right to determine which "outsiders" should be permitted entry into its hallowed halls. Labor organizations were equally adamant that the right to participate in the so-called "walk around" inspection was absolutely essential both to insure vigorous, comprehensive scrutiny of the plant and to counteract the lingering suspicion that otherwise only management's "version" of the conditions in the plant would be articulated to the federal inspector. The legislative resolution reflected in the above quoted language is a testimonial to the fact that Congress consciously chose to accord bargaining unit employees, through their representatives, direct participation in the most crucial aspect of enforcing the Act—the walk around inspection.

In the bill passed by the House, the employees' representative was allowed to go along on the inspection *only* if the employer representative did so. However, the conferees rejected this in favor of the Senate provision which ultimately was enacted as § 8(e). Of particular significance is the following explanation of the need for this provision as contained in Senate Labor Report No. 91-1282:

In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of en-

⁶⁶ *Id.* In this connection, one might be curious to know to what extent advance notice has been predicated on this rationale and, further, the impact such notice has had on the effectiveness of such inspections.

⁶⁷ *Id.* § 1903.6(b).

⁶⁸ Operations Manual, 2 O.S.H. REP. 77, at 2502 (BNA 1970).

try in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment. Section 8(a) therefore authorizes the Secretary or his representative, upon presenting appropriate credentials, to enter at reasonable times the premises of any place of employment covered by this act, to inspect and investigate within reasonable limits all pertinent conditions, and also to privately question owners, operators, agents or employees.

During the field hearings held by the Subcommittee on Labor, the complaint was repeatedly voiced that under existing safety and health legislation, employees are generally not advised of the *content and results of a Federal or State inspection*. Indeed, they are often not even aware of the inspector's presence and are thereby deprived of an opportunity to inform him of alleged hazards. Much potential benefit of an inspection is therefore never realized, and workers tend to be cynical regarding the thoroughness and efficacy of such inspections. *Consequently, in order to aid in the inspection and provide an appropriate degree of involvement of employees themselves in the physical inspections of their own places of employment, the committee has concluded that an authorized representative of employees should be given an opportunity to accompany the person who is making the physical inspection of a place of employment under section 9(a).*⁶⁹

The manner in which the Secretary has decided to implement the § 8(e) inspection raises some interesting questions. First, as noted, the statute provides that "a" representative of the employer and "a" representative of the employee shall be given an opportunity to accompany the Compliance Safety and Health Officer. Since as a practical matter there may well be situations in which it would be desirable to have *more* than

⁶⁹ LEGISLATIVE HISTORY, *supra* note 4, at 141 (emphasis supplied). Notwithstanding the fact that employees thus have a statutory right to participate in the walk around inspection, some employers have refused to compensate them for time spent on inspections conducted during working hours. In one such instance, the Oil, Chemical and Atomic Workers International Union filed a complaint with the Secretary of Labor on behalf of the employees it represented at the Paulsboro, New Jersey, refinery of the Mobil Oil Corporation. OCAW sought to invoke the Secretary's authority to bring a suit in federal district court for an employee who has been discriminated against by an employer "because of the exercise by such employee on behalf of himself or others of any right afforded by [OSHA]" under §§ 11(c) (1), (2).

Essentially, OCAW argued that an employee engaged in aiding a federal inspector was performing a service which is an inherent part of the employer's business. According to the OCAW, time devoted to aiding an inspector in checking and evaluating whether the employer's machinery and equipment are in a safe condition should have been treated identically to time devoted by mechanics and repairmen who service the same equipment daily to insure its safe, operative condition. There was no dispute that by failing to compensate the employee representatives, Mobil Oil had effectively imposed a financial penalty upon those persons for having exercised their statutory right to participate in the walk around inspection.

Nevertheless, in a memorandum opinion issued by the Solicitor of Labor on March 1, 1972, the Secretary declined to initiate any lawsuit against Mobile Oil Corp., 1 O.S.H. REP. 962 (BNA 1972). Rather, the Secretary found that "an employee participating in the walk around is not engaging in normal work activity" and, therefore, it was *not* discrimination within the meaning of § 11(c) (1) for Mobil Oil to refuse to pay the employee for time spent in that activity. In so holding, the Secretary stood the legislative history of OSHA on its head by reaching the diabolical conclusion that the principal beneficiaries of the walk around are the employees themselves and therefore they should be prepared to pay for these benefits. It is anticipated that union counsel will soon file a lawsuit to challenge this result.

one representative present from each of the respective interested parties, the regulations properly accord the CSHO discretion to permit "additional" employer *and* employee representatives to participate if such participation will "further aid the inspection."⁷⁰ The regulation thus expands a basic tenet expressed on the face of § 8(e)—namely, equal treatment for all interested parties insofar as the walk around is concerned. Yet, it is my understanding that certain CSHO's have permitted substantial numbers of management representatives to accompany them on a plant inspection tour while simultaneously limiting the employees to one representative. Of course, additional company plant personnel may prove helpful to the inspector; with this judgment one cannot quarrel. But the failure to pursue a similarly liberal policy with respect to employee representatives is disquieting and inexplicable.⁷¹ It runs contrary to the spirit of the statute, and is also self-defeating insofar as the Secretary's objective is to insure effective safety and health programs. Thus, it seems clear that the inspector will be aided both by the presence of a local union safety committeeman employed in that plant and, for example, a safety engineer or industrial hygienist who works for an international union with which that local is affiliated. The regulations plainly contemplate the participation of such so-called "third parties,"⁷² but the problem is that CSHO's may mistakenly assume that *if* they permit such third party participation in the walk around, it is *in lieu of* any other authorized employee representative.

Second, the Secretary has established a controversial procedure for a conference at the close of the inspection between the CSHO and the owner, operator or employer representative. At that closing conference the CSHO will advise management concerning "all conditions and practices disclosed by the inspection which may constitute safety or health violations."⁷³ Yet, no employee representative is permitted to attend this all important session at which the inspector imparts to management the tentative results of his tour of the plant. The Secretary has provided only that upon request the CSHO will engage in a separate "generally responsive discussion" with the employee representative.⁷⁴ What this entirely nebulous phrase means is debatable; to the employee organization the only satisfactory "responsive discussion" would be one in which a CSHO repeats the substance of

⁷⁰ 29 C.F.R. § 1903.8(a) (1972).

⁷¹ Certainly, since the CSHO has authority to deny the right of accompaniment "to any person whose conduct interferes with a fair and orderly inspection" under 29 C.F.R. § 1903.8(d) (1972), the Secretary is already protected adequately against the possibility of disruptive behavior, an unwieldy number of representatives, or any other potential abuse resulting from the walk around. In point of fact, we are not aware of any reported incidents where such abuse has occurred.

⁷² *Id.* § 1903.8(c).

⁷³ Operations Manual, 2 O.S.H. REP. 77, at 2521 (BNA 1970).

⁷⁴ *Id.* at 2522.

their prior comments to management at the closing conference. But it is highly doubtful whether CSHO's consider themselves bound to do so.

The rationale upon which the Secretary relies in barring the employee representatives from the closing conference—that "they will already have communicated and participated with the CSHO during the inspection"—totally misses the mark. It fails to come to grips with the employee representatives's need—indeed right—to know the outcome of the CSHO's inspection. Perhaps even more important is the psychological impact of separate "behind closed doors" meetings between the CSHO and management. An inevitable consequence of this procedure is to breed suspicion in the minds of the employee representatives that management will persuade the inspector that, for example, he erred in certain respects in his tentative evaluation, or that certain ostensibly "serious" violations are in fact insignificant. Irrespective of whether such concerns are well-founded,⁷⁵ the fact remains that they will persist. This procedure thus places the CSHO in the unfortunate position of appearing to deal privately with the employer to the potential detriment of the employees.

Paradoxical though it may seem to the employees directly concerned, the Secretary's exclusionary policy concerning closing conferences is ominously reminiscent of the pre-OSHA problems caused by the exclusion of employee representatives from the walk around inspections. The decision to subordinate the interests of employee representatives for purposes of the closing conference is inconsistent with the provisions in the OSHRC regulations which at least by strong implication support the principle that a labor organization is a necessary party to any formal settlement under the Act.⁷⁶ If a labor organization's approval is ultimately needed to settle a case once a violation is charged, a fortiori it should be entitled in the first instance to information concerning what the case is all about.

The Secretary might attempt to explain his exclusionary policy on the ground that labor organizations might use the information acquired in the closing conference to achieve some nefarious labor-management relations goals. But this is sheer conjecture. It is symptomatic of the Secretary's more general shortcoming in fearing and adamantly resisting any recognition that OSHA is and will continue to remain an integral fact of life in labor-management relations, just as is the NLRA.⁷⁷

The scope of inspection will generally be explained by the CSHO at the opening conference to be held promptly upon his arriving at the plant

⁷⁵ The "CSHO shall make no statement which could be construed as committing the department to issuing or not issuing a citation with respect to an apparent violation." *Operations Manual*, 2 O.S.H. REP. 77, at 2521 (BNA 1970).

⁷⁶ 29 C.F.R. §§ 2200.5(a), .23 (1972).

⁷⁷ *Operations Manual*, 2 O.S.H. REP. 77, at 2509 (BNA 1970). One of the numerous ways that the Secretary's position has manifested itself is through the directive that inspections will be initiated at struck plants only with the prior approval of the Area Director.

to be inspected. If the union plans to participate in the walk around, it should take appropriate steps to insure its presence at this opening conference.⁷⁸ In essence, the following fundamental principles will apply:

(a) The CSHO has broad authority, *inter alia*

to inspect and investigate during regular working hours and at other reasonable times and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein. . . .⁷⁹

(b) In furtherance of this "rule of reason," the CSHO may, under compulsion of law, require employers to produce relevant records, materials and/or witnesses.⁸⁰ He is also directed to check whether the employer has satisfied his statutory duty of posting applicable informational notices to the employees.⁸¹

(c) When acting on a complaint, the CSHO should not restrict himself to the specific conditions alleged; he should inspect the entire facility or workplace, unless time does not permit. This means that in the course of the walk around any employee has the right to bring *any* condition which he believes violates a standard or the general duty requirement to the attention of the CSHO.⁸² Further, as a practical matter, it means that it is incumbent upon a labor organization desiring a comprehensive inspection to impress upon the CSHO the need to "find sufficient time" and resources to pursue such complaints.⁸³

(d) In addition to employee interviews, CSHO's are authorized—indeed encouraged—to utilize photographic techniques as a method of recording violations of existing standards⁸⁴ and to rely upon direct reading instruments when inspecting industrial hygiene conditions.⁸⁵ The services of a qualified industrial hygienist may be requested if the CSHO has reason to believe an in-depth analysis is necessary to uncover alleged health hazards. Suffice it to say, as the true dimensions of the environmental pol-

⁷⁸ *Id.* at 2510. In situations of p&m employees being represented by one labor organization and a separate craft unit has been severed and is represented by another, the CSHO should permit each employee representative to accompany him at least in touring that portion of the employer's plant in which the employees he represents work (e.g., an IBEW representative in the electrical maintenance shop and an industrial union representative in the rolling mills). *See id.* at 2511-12.

Likewise, where one labor organization represents all the p&m employees, it would seem logical and appropriate that the particular local union safety committeeman who has jurisdiction over a department should accompany the inspector in touring that department and then drop out of the inspection and have other safety committeemen perform the same function for their respective departments.

⁷⁹ 29 U.S.C. § 657(a) (2) (1970).

⁸⁰ Operations Manual, 2 O.S.H. REP. 77, at 2502-07 (BNA 1970)

⁸¹ 29 U.S.C. § 657(c) (1) (1970).

⁸² Operations Manual, 2 O.S.H. REP. 77, at 2302, 2512, 2515-16 (BNA 1970).

⁸³ *Id.* at 2703.

⁸⁴ *Id.* at 2518-20.

⁸⁵ *Id.* at 2720-21.

lution problem surface, labor organizations naturally can be expected to place increasing emphasis on aggressive enforcement of stringent standards for regulating exposure to health hazards, toxic substances, and harmful physical agents.

As noted, § 8(c)(3) requires the Secretary, in cooperation with the Secretary of Health, Education and Welfare, to issue regulations requiring employers to: (1) maintain accurate records of employee exposure to potentially toxic materials or physical agents; (2) accord employees or their representatives an opportunity to *observe* such monitoring and measuring and to have access to such records; and (3) permit employees access to records which reflect their own exposure to toxic materials or harmful physical agents and *notify* any employee being exposed to excessive concentrations of this fact as well as the corrective action being taken. Read literally, this section offers an extraordinary vehicle for coping with the grave challenge posed by insidious occupational health hazards. To date the Secretary has barely begun to face up to the vitally important responsibilities imposed by § 8(c)(3). In the long run, however, the success or failure of OSHA may well turn in large measure on the effectiveness of the Secretary's implementation of this significant provision.

III. CONCLUSION

The foregoing analysis of OSHA is far from exhaustive. It was intended only to serve as a catalyst to awaken the practicing attorney to the myriad of legal problems created by this landmark legislation. Further, we have not even paused to consider the impact of OSHA either on the collective bargaining process in general or on its application to the interpretation and enforcement of safety and health contract provisions. From an industrial relations perspective, this is unquestionably an integral part of any evaluation of the import of OSHA.

In closing, it also should be noted that I have purposefully avoided lengthy statistical recitations concerning the number of inspections requested and conducted, citations issued, and total dollar value of civil penalties assessed to date. This is not, I submit, the measure of the effectiveness of the statute: rather the success or failure of OSHA will turn upon whether it achieves its lofty goal of assuring working men and women safe and healthful working conditions.
